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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1928.

No. 73.

UNADILLA VALLEY RAILWAY COMPANY,
PETITIONER,

vs.

ERNEST CALDINE, AS ADMINISTRATOR OF THE GOODS, CHATTELS AND CREDITS OF HAROLD E. CALDINE, DECEASED.

Brief on Behalf of Respondent.

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BRIEF ON BEHALF OF RESPONDENT.

Statement of the Case.

The case is here on writ of certiorari to the Court of Appeals of the State of New York.

Respondent herein sued the petitioner, a common carrier engaged in interstate commerce, under the Federal Employers' Liability Act, to recover damages for the death of his son, Harold Caldine (R., pp. 3-8; R., pp. 12-17). The act imposes liability upon a common carrier engaged in interstate commerce for the death of any employee "resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier." The highest court of the State of New York, viz, the Court of Appeals, reversed the Appellate Division of the State of New York and reaffirmed a verdict of the Trial Court for the respondent in the sum of $2,200 (R., pp. 105, 118-121). The opinion of the Court of Appeals is reported in 246 N. Y. at page 365.

Most of the facts connected with the case have been presented in the brief of the petitioner and respondent will only briefly refer to these facts. However, there are certain facts connected with the case not presented by the petitioner and these facts will be hereinafter set forth.

Petitioner at the time of the occurrence was engaged in interstate commerce operating trains on a single track from Richfield Junction through Bridgewater and River Forks to New Berlin, New York State (R., p. 22). On June 25, 1924, respondent's intestate, Caldine, a conductor in the employ of petitioner, was killed in a head-on collision between the passenger train, of which Caldine was conductor, and a freight train of the railroad at a point near Bridgewater, N. Y. (R., p. 28). On the day of the occurrence Caldine was conductor of a railroad train of the company operated by gas, known as Train No. 2, which was due to leave Bridgewater at 8:10 in the morning, going south; one Dibble was motorman of that train. Train No. 2 had been running for about two months (R., pp. 54, 77, 78). Train No. 15, a freight train of the railroad company, in charge of one Risley, as conductor, coming from the opposite direction, was due to arrive at Bridgewater at eight o'clock in the morning (R., pp. 36, 37).

At the time Caldine was killed the petitioning railroad company had no book of rules (R., pp. 35, 36), had no block signal system on it or at the yards, did not have any semaphore signal system (R., p. 36), had no telegraph system (R., p. 23), and their only method of communication along the railroad line for safety was the telephone (R., p. 23). The road was practically under the supervision of the dispatcher.

Prior to the time of the occurrence it had been the custom of the freight conductor, Risley, to inform Dawson, petitioner's operator at Bridgewater, when he left River

Forks and it had been the custom of Dawson to tell Caldine while his car was in Bridgewater when the train was going north, as to the whereabouts of the freight train, and if it was on the right of way of the train of Caldine (R., pp. 27, 50). This is shown by the following testimony of the petitioner's operator and dispatcher, Dawson:

> "Q. Isn't it a fact that a number of times this man, Risley, phoned to you, as station agent and operator, that he was coming, to hold gas car? A. Yes.
>
> "Q. Hasn't he done that before that time? A. Yes, several times.
>
> "Q. It has been the custom of yourself to go out and tell them they were coming? A. Yes.
>
> "Q. And that was the custom while the train was on there? A. Yes.
>
> "Q. And you told Caldine, didn't you? A. Yes.
>
> "Q. But this morning you didn't tell him? A. No" (R., p. 50).

On the day in question the conductor of the freight train telephoned Dawson at Bridgewater for safety's sake and informed him that the freight train was on its way and asked him to hold the gas car at Bridgewater (R., pp. 27, 28, 39). Notwithstanding this information Dawson never said one word to the conductor, Caldine. Dawson claims that he did tell the motorman, Dibble (R., pp. 39, 40, 53). Dibble denies this (R., p. 54). Caldine, not receiving any information on the morning in question, felt secure in leaving Bridgewater station and signalling the train to go ahead. The collision occurred shortly after he had left the station (R., p. 28).

It will be noted by the Court that most of the witnesses in the case at bar were employees of the petitioner so that the respondent was in the position of proving most of his case by unwilling witnesses.

ARGUMENT.

As presented by the petitioner in its brief submitted herein the real question for determination is: Was the death of Harold Caldine, conductor of Train No. 2, caused solely by his own negligence or was it due in whole or in part to the negligence of Dawson, the station agent, or to that of Dibble, the motorman, or to the negligence of both of them? It is claimed by the petitioner that the death of Caldine was due solely to his own negligence.

It is the contention of the respondent that under the facts of the case at bar it cannot possibly be said as a matter of law that Caldine's negligence, if he was at all negligent, was the sole and proximate cause of the collision which caused his death. The facts show conclusively that the negligence of employees, other than Caldine, was in whole or in part directly and proximately responsible for the occurrence which caused his death. For this reason there is no merit in the position of the petitioner and the judgment complained of should be affirmed.

The petitioner maintains that the collision and death of Caldine were caused solely by the negligent act of Caldine in violating a supposed rule of the petitioner by signalling Train No. 2 to go forward without waiting for the freight train at Bridgewater. Petitioner claims that a statement on the time-table of the company that said freight train and Caldine's train were to pass at Bridgewater was what they called a positive order. This rule petitioner contended could not be countermanded except by written order signed by the superintendent (R., pp. 77, 78). Petitioner's railroad had no telegraph system, so how could a message be given except by telephone (R., p. 23).

If such notice on the time-table can possibly be

considered a positive order such rule was entirely abrogated by the custom and conduct of the employees in the use of the telephone and continued acquiescence by the railroad company in such custom and conduct and knowledge thereof. The rule stated in the time-table was habitually disregarded and its disregard was such that the company in the exercise of reasonable care could discover its customary disregard for they well knew the highly inadequate protection the employees had and must have known about the only way of keeping in touch with each other along the railroad line was by telephone.

There is no doubt that a railroad company, having authority to establish rules for the government of employees, may waive obedience to the rules, or may entirely acquiesce in a disregard of the rules so continuously as to justify the inference that they are no longer in force and that obedience is not required. This was the fact in the case at bar. The supposed rule had been abrogated and Caldine was not negligent in violating an abrogated rule.

But even if we assume that Caldine was negligent in the violation of a positive rule in signalling the car to go forward it cannot be reasonably and logically said that his negligence was the sole and proximate cause of the accident. As was said by the Court of Appeals of the State of New York, in reaffirming the verdict of the Trial Court in the case at bar (246 N. Y. 365):

> "Nevertheless, the conductor, in violation of printed orders, signaled the gasoline car to proceed toward River Forks and the motorman, also in violation of them, obeyed the signal and started the car in plain sight of the station agent. The conductor's negligence cannot be viewed as the sole proximate cause of the collision. The station agent could and should have prevented it. So could the motorman. All three were negligent. If Caldine had not signaled in violation of orders, the collision would not have occurred. Neither would it have

> happened if Dawson had communicated Risley's message to Caldine. If Dibble had performed his duty and, in the absence of written abrogation of permanent orders, had refused to obey Caldine's signal, the gas car would have remained at Bridgewater yard and allowed the freight to take the turntable siding. Dawson knew that the freight was approaching; Dibble ought to have known it and should have kept his car stationary. Negligence was not solely Caldine's. His death resulted in part from the negligence of Dawson and Dibble. * * * If other employees in secondary relation to the movement of trains might, by mere possibility, be deemed negligent, then actual negligence by the deceased is regarded as the sole and proximate cause of his death (*Davis vs. Kennedy*, 266 U. S. 147). Here the negligence of decedent's co-employee, Dawson, is more than merely possible. It is actual and flagrant. Dibble, the motorman, like Kennedy, the engineer, was in direct control of the car's movement and his failure to await the arrival of the freight was the primary cause of the collision. His duty bound him to disregard the conductor's signal until he was certain that the freight had taken the turntable siding. The conductor's duty was merely secondary to that of the motorman. This, as we understand, conforms with the reasoning in the *Kennedy* case (*supra*)" (R., pp. 118-121).

It is the contention of the respondent that the collision and resulting death of Caldine was caused not alone by any negligence of Caldine, if said Caldine could be considered negligent, but was caused in whole or in part by the negligence of Dawson and the negligence of Dibble, the motorman. Dawson did not give Risley's telephone message to Caldine. Certainly if this information had been given to him the collision would not have occurred. Instead of doing so Dawson sat on a bench outside of the station at Bridgewater chatting with some other men instead of attending to his business at the time in question (R., pp. 62, 63). Dibble was negligent in that in the face

of positive orders, if there were such orders, he started the car, knowing that a collision was inevitable. Can it be said, as a matter of law, that Dawson, under the circumstances, owed no duty to inform Caldine of the telephone message from Risley? The petitioner seeks to hide the actual and flagrant negligence of Dawson by stating he was not negligent and asserting that if he had given Caldine the message it would have amounted to nothing more than saying, "Obey your written instructions." Respondent submits that it would have amounted to a great deal more. It would have prevented the collision. Dawson sat idly by while the train left the station, knowing that a collision was inevitable (R., pp. 62, 63). Under the circumstances he owed the legal, human duty to give the information which would have avoided this terrible occurrence.

The petitioner contends that the Court of Appeals was in error in holding that the motorman of the train should not have obeyed the signal, stating that the holding is erroneous and is a most dangerous one, for if the engineer of a train can at will violate the signal of a conductor the safety of the employees of the carrier and the safety of the travelling public as well would be jeopardized to the highest degree. As a matter of fact, the Court of Appeals of New York did not hold that the engineer of a train can at will violate the signals of a conductor, but properly and justly held that the engineer is in direct control of the train's movement and if the engineer, as well as the conductor, is under definite rules of the company the engineer owes a legal duty to adhere to the rules and would be guilty of negligence in violating them. It certainly would be a dangerous and illogical rule to hold that the motorman should always follow the signals of a conductor even though it was in violation of a rule and even though he knew that following such signals would place the train in inevitable danger.

There is no merit in the contention of the petitioner that the Appellate Division of the State of New York was correct in holding that no recovery could be had in this case and in basing that holding upon the decision of this Court in the case of *Kennedy vs. Davis*, 266 U. S. 147 (218 App. Div. N. Y. 5, 217 N. Y. S. 705) (R., p. 113). The Court of Appeals has properly applied the *Kennedy* case and was justified in reversing the decision of the Appellate Division (246 N. Y. 365). The *Kennedy* case, in so far as applicable to Caldine's negligence, is distinguishable from the case at bar in many respects. In that case the engineer, Kennedy, was killed and the action was brought against the railroad company on the ground that possibly some of the other members of the crew, secondary in command, were bound to look out for approaching trains coming in an opposite direction, and that their negligence contributed in a proximate way to the death of the engineer. In that case the facts were such that the other employees' negligence was secondary to that of the plaintiff's. It could hardly be contended in the case at bar that Dawson's negligence or Dibble's negligence was secondary to anyone. Dawson's negligence was in fact primary for, as station agent, he was conclusively presumed to know the schedule of all the trains on that line. Dibble's negligence was also primary and proximate as stated in the opinion of the Court of Appeals of the State of New York. The *Kennedy* case was decided upon the case of *Freese vs. Chicago, Burlington and Ohio R. R. Co.*, 263 U. S. 1, and upon the fact that even if those in secondary relation did their duty and performed every act they should have done, even then the accident might have occurred. In the *Kennedy* case no one was negligent other than Kennedy himself, whereas in the case at bar certainly the negligence of Dawson or Dibble or the negligence of both of them was in part at least a proximate cause of the collision. In the *Kennedy* case the train coming from the opposite direction had the right of way.

Whereas, in the instant case the passenger car upon which Caldine was conductor had the right of way over the freight train which was coming in the opposite direction (R., p. 55). In the *Kennedy* case plaintiff was told of the car coming, whereas in the instant case Caldine was not told.

In the case at bar it is the contention of respondent that respondent's intestate was free from contributory negligence by reason of the custom which had grown up of the operator, Dawson, at Bridgewater notifying him when the freight train was coming north on the same track on which he was going south; however, if this Court feels, as did the Court of Appeals of the State of New York, that Caldine was negligent, the most that can be said is that his negligence was only in part a proximate cause of the collision in question and under the statute this is not a bar to recovery but only goes to diminish the damages in proportion to the contributory negligence of respondent's intestate.

> *Compiled Statutes of the United States*, Vol. 8, p. 9423, Sec. 8659.

Contributory negligence does not bar a recovery under the Federal Employers' Liability Act.

> *Union Pac. R. R. Co. vs. Hadley*, 246 U. S. 330.

In the case of *Union Pacific Railroad Company vs. Hadley, supra*, the plaintiff's intestate in that case was a brakeman who was killed while in the caboose of his train. His duty, by positive railroad rule, required him to go back and give certain signals to trains in the rear thereof when his own train was stopped on the tracks. The brakeman failed to go back and flag a train coming from the rear of his train, but stayed in the caboose, and a train coming from the rear ran into the caboose and killed the brakeman, plaintiff's intestate, but this Court held that his negligence was not the only proximate cause

of his death, for it appeared in that case that the train which ran into his train and killed him was at the place in question by reason of the negligent operation of trains by a dispatcher and station agent of the railroad company in routing trains.

In the case of *Union Pacific Railroad Company vs. Hadley, supra*, the train which ran into plaintiff's intestate's train in that case would not have been at the place of collision had the dispatcher done his duty, and in the case at bar had the dispatcher and operator, Dawson, done his duty and notified respondent's intestate that the Freight Train No. 15 was coming, then respondent's intestate would not have been at the place in question.

In the case of *Union Pacific Railroad Company vs. Hadley, supra*, this Court held that Hadley, the brakeman, was negligent in not going back and notifying trains coming from the rear after his train had been stopped, and, although this was actual proof of negligence on his part, the Court held that it could not be declared as a matter of law that the proximate cause of the brakeman's death was his contributory negligence and that, under the Federal Employers' Liability Act, it did result, in part, in the negligence of an employee of the railroad company.

Hence, under the ruling in the *Hadley* case, *supra*, the instant case certainly presented a question of fact for the jury upon the proposition of the negligence of the petitioner's other employees and the contributory negligence of respondent's intestate.

This Court, in the case of *Chicago, Rock Island & Pacific Railroad Company vs. Ward*, 252 U. S. 18, sets forth the provision that under the Federal Employers' Liability Act, contributory negligence is not a defense and only goes in mitigation of damages.

Whether under the facts of this case Caldine's negligence was the sole cause of his injury or whether the

negligence of the other employees contributed in whole or in part to the cause was a question of fact for the jury and was properly determined. The Appellate Division of the State of N. Y., with all due and kind respect to them, erred when they held that the deceased was proximately and solely to blame for his own death, for as said by Judge Knappen, speaking for the Federal Circuit Court of Appeals in the *Pennsylvania Co. vs. Cole*, 214 Fed. 948: "But the Employers' Liability Act expressly abrogates the common-law rule under which action was barred by negligence of the plaintiff proximately contributing to the accident and substitutes therefor the rule of comparative negligence. Under this act no degree of negligence on the part of the plaintiff, however gross or proximate, can, as a matter of law, bar recovery." As was stated in *Grand Trunk W. Railway vs. Lindsay*, 201 Fed. 836, 844, in passing upon the contention that the plaintiff's action was barred by his proximate negligence the Circuit Court of Appeals for the 7th Circuit said: "It is only when the plaintiff's act is the sole cause, when defendant's act is no part of the causation, that the defendant is free from liability under the act." This ruling was held correct by this Court in *Grand Trunk W. Railway Co. vs. Lindsay*, 233 U. S. 42, at page 47.

The Federal Statute would be nullified if it was held, under the facts of the instant case, that the acts of respondent's intestate were the sole proximate cause of his injury and death.

Conclusion.

It is respectfully submitted:

1. The Court of Appeals of New York by its opinion and judgment in this case has reasonably and properly applied the provisions of the Employers' Liability Act